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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

BI-STATE DEVELOPMENT AGENCY OF THE MISSOURI-ILLINOIS METROPOLITAN DISTRICT,
Petitioner,

vs.

ABBOTT AMBULANCE, INC.
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The citizen suit provision of the Resource Conservation Recovery Act ("RCRA") gives federal district courts jurisdiction to "restrain" any person who has contributed to the handling of a solid or hazardous waste which endangers the environment or to "order such person to take such other action as may be necessary." 42 U.S.C. §6972 (a)(1)(B). Certiorari should be granted to verify that the citizen suit provision authorizes and includes within its equitable remedies restitution.

PARTIES TO THE PROCEEDING

Petitioner, Bi-State Development Agency of the Missouri-Illinois Metropolitan District (the "Agency"), is a body corporate and politic organized pursuant to a compact between Missouri and Illinois. Mo.Rev.Stat. §70.370 (1994); Ill.Rev.Stat. ch. 127, ¶63r-1 (1989) (identical compact provisions). The compact creates a single interstate agency to coordinate regional planning and development of the Bi-State Metropolitan Development District (the "District"). The District is comprised of geographic areas of the City of St. Louis, Missouri, the Missouri counties of St. Louis, St. Charles and Jefferson, and the Illinois counties of Madison, St. Clair and Monroe. Mo.Rev.Stat.§70.370, art. II. The Agency was a plaintiff in the lower court proceeding of this case and was the appellant before the United States Court of Appeals for the Eighth Circuit.

Respondent, Abbott Ambulance, Inc. was once a privately-owned corporation, existing by virtue of the laws of the State of Missouri. Abbott Ambulance, Inc. is now a not-for-profit corporation operating in the State of Missouri. Respondent Abbott Ambulance, Inc. was a defendant to the action in the lower court proceedings. Abbott Ambulance, Inc. was also the appellee before the United States Court of Appeals for the Eighth Circuit.

There are no other parties to this action.

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Petitioner, Bi-State Development Agency of the Missouri-Illinois Metropolitan District (the "Agency") respectively petitions for a Writ of Certiorari, to review the decision and opinion of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The per curiam opinion of the court of appeals dated November 13, 1995 is unpublished. It is reprinted in the Appendix hereto at page A-1. The court of appeals issued its per curiam opinion in this matter relying on another opinion of the court of

appeals, *Furrer v. Brown*, 62 F.3d 1092 (8th Cir. 1995), reprinted in the Appendix hereto at pages A-6 - A-26. The unpublished order and memorandum of the district court in this case, dated March 27, 1995 dismissing the underlying action is reprinted in the Appendix at A-3 - A-5.

STATEMENT OF JURISDICTION

Petitioner seeks review of the opinion of the United States Court of Appeals for the Eighth Circuit and its judgment of November 13, 1995. That judgment affirmed the lower court's dismissal. Petitioner invokes certiorari jurisdiction conferred upon this Court by 28 U.S.C. §1254(1).

STATUTE INVOLVED

§7002(a)(1)(B) of the Resource Conservation Recovery Act, 42 U.S.C. §6972(a)(1)(B), provides in pertinent part:

> Except as provided in subsection (b) or (c) of this Section, any person may commence a civil action on his own behalf.
>
> (1)(A) . . .
>
> (B) against any person, including the United States, and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility *who has contributed* or who is contributing *to the past or present* handling, storage, treatment, transportation or *disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment*;
>
> . . .

> . . .The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties . . . *to restrain any person who has contributed* or who is contributing *to the past or present* handling, storage, treatment, transportation, or *disposal of any solid or hazardous waste referred to in paragraph (i)(B), to order such person to take such other action as may be necessary, or both* . . . (emphasis added)

STATEMENT OF THE CASE

The primary mission of the Agency is to provide mass public transportation in the St. Louis Metropolitan area. Currently, Bi-State operates bus transportation and the MetroLink Light Rail System within its District. In addition to owning facilities to house mass transportation operations, the Agency has acquired significant numbers of parcels of property and rights-of-way to construct MetroLink stations and to operate the system currently on line. Extensions of MetroLink are planned and are in the early stages of implementation. To implement these plans of expansion and to further the Agency's mission to provide cost and energy efficient mass transportation, it has been and will be necessary for the Agency to acquire, own and operate significant amounts of property in the area.

The Agency is funded by fair box receipts, sales tax revenues from service areas, and federal grants. The MetroLink project is primarily funded through federal grants with local matching funds.

The Agency acquired a significant number of parcels of property and rights-of-way to construct and operate the MetroLink Light Rail System in the communities of St. Clair County, Illinois, City of St. Louis, and St. Louis County, Missouri. Some of the property acquired by the Agency for use by the MetroLink Light Rail System was taken by exercise of the Agency's right of eminent domain. Some parcels contain previously existing

environmental hazardous, including asbestos, underground storage tanks, hydrocarbon contamination and polycholorinated biphenols ("PCBs").

The property at issue in this lawsuit is located at 276 DeBalivere Avenue, St. Louis, Missouri (hereinafter referred to as the "Property"). In this case, the Property contained underground storage tanks which caused hydrocarbon contamination. The Agency in no way contributed to the contamination at this site, or any other MetroLink site. The Agency is an innocent landowner. Moreover, the Agency had no choice in whether to acquire the property, the right-of-way for the MetroLink Light Rail System was selected by the Metropolitan Planning Agency in accordance with federal law. The Property in question lays upon the preselected path for MetroLink, based on federally mandated criteria. Also, the Agency is subject to strict time deadlines in completing each phase of the construction of the MetroLink Light Rail System. The time deadlines allow little room for error, and include built in penalties in the event of failure.

Respondent Abbott Ambulance, Inc. last owned and operated the Property. On August 15, 1991, the Agency acquired the Property by exercise of its power of eminent domain. An action was filed in the circuit court for the City of St. Louis styled *Bi-State Development Agency v. Abbott Ambulance Inc.*, Cause No. 912-00493. The matter was resolved by settlement and no trial took place at the lower court level. In total the Agency paid Respondent Abbott Ambulance $320,000.00 in compensation for the taking of the Property. The Property was last used by Abbott Ambulance as a garage to house and repair ambulances. Abbott Ambulance constructed office space on the Property around 1980. At no time during the discussions between the Agency and Abbott Ambulance, Inc., conducted during the condemnation process, did Abbott Ambulance disclose to the Agency that there were underground storage tanks on the Prop-

erty, or that any underground storage tank was leaking or had leaked prior to the Agency acquiring the Property.

During the condemnation process, the Agency commissioned an environmental survey which revealed two underground storage tanks and some contamination on the Property. The Agency then learned that one of the tanks had been placed on the Property by Abbott Ambulance and was used to store gasoline. The other tank was used for waste oil. After the Agency acquired the Property from Abbott Ambulance, the Agency began to prepare the property for use in the MetroLink system. To do so, it was necessary to remove the two underground storage tanks which were revealed by the environmental survey.

Site preparation required the demolition of all structures on the Property, including the office building constructed by Abbott Ambulance. During the removal of the two known tanks, and the demolition of the office building, four additional underground storage tanks were discovered. These four additional tanks were only discoverable when the office building was demolished and its foundation removed. In addition to contamination from the two known tanks, the four tanks were severely damaged and obviously leaking.

Upon this discovery the Agency directed further environmental examination of the surrounding soils, the results revealed contamination from leakage of all six tanks. The Agency's examination, removal, disposal, clean-up and other remedial action was required by law to render the Property fit for its intended use in the MetroLink Light Rail System. The Agency did not have the luxury of time to resolve the dispute regarding shifting of remediation costs prior to clean-up. Abbott Ambulance categorically refused to share the costs and time delays were simply not possible given severe penalties built into the funding agreement. The Agency incurred expenses in excess of $260,000.00 to complete the clean-up.

The Agency is an innocent landowner, having never used or operated the underground storage tanks and having never engaged in any activity which was the cause of the contamination on, near or under the Property. Despite this fact, Respondent Abbott Ambulance has refused to reimburse or in any way compensate the Agency for costs incurred to clean-up the site. The settlement agreement to resolve the condemnation suit between Abbott Ambulance, Inc. and the Agency ignores the contamination issue. In fact, Abbott Ambulance refused to compensate or credit the Agency for any costs incurred to remove the environmental contamination.

As a result of Abbott Ambulance's continual refusals, the Agency filed its complaint in the United States District Court for the Eastern District of Missouri, Eastern Division on May 2, 1994, seeking recovery of clean-up costs expended to render the Property formerly owned by Abbott Ambulance in a safe condition. That cause of action is styled *Bi-State Development Agency v. Abbott Ambulance, Inc.*, Cause No. 4:94CV859. Count I of Petitioner's complaint is based on Section 7002 of the Resource Conservation Recovery Act ("RCRA"), 42 U.S.C. §6972(a), seeking restitution for costs expended in remediating petroleum contamination. Respondent moved to dismiss count I asserting that the court did not have subject matter jurisdiction based on its contention that remediation expenses are not recoverable under RCRA. On March 27, 1994, the district court granted Abbott Ambulance's motion to dismiss.

On November 13, 1995, the court of appeals issued its per curiam opinion dismissing the appeal based on its opinion in the *Furrer v. Brown*, case. The Furrer opinion was issued on August 15, 1995, a divided panel affirmed the judgment of the lower court, dismissing that claim as well. *Furrer v. Brown*, 62 F.3d 1092 (8th Cir. 1995) (Judge Fagg dissenting); App. at A-6 - A-26.

Petitioner now seeks the review of this Court.

The issue to be decided in this case pertaining to the scope of equitable remedies available is substantially similar to one issue currently before the Court in *Meghrig v. KFC Western, Inc.*, No. 95-83. However, this matter does not involve the jurisdictional question of whether the requirement of an imminent and substantial danger to health or the environment is met after clean-up is complete. So the cases are not identical. The Agency filed its *amicus curiae* brief supporting Respondent's position in *Meghrig v. KFC Western Inc.*, No. 95-83.

REASONS FOR GRANTING THE WRIT

I.

THE DISTRICT COURTS ARE EMPOWERED TO AWARD RESTITUTION UNDER RCRA'S CITIZEN SUIT PROVISION BECAUSE CONGRESS DID NOT CLEARLY AND UNMISTAKABLY LIMIT THE BROAD EQUITABLE JURISDICTION OF THE DISTRICT COURTS, AND THE REMEDY OF RESTITUTION PROMOTES RCRA's STATUTORY PURPOSES.

A. The District Courts Are Empowered to Grant All Traditional Equitable Remedies, Including Restitution, Because RCRA's Citizen Suit Provision Invokes The Broad Equitable Jurisdiction of the District Courts Without Clearly and Unmistakenly Limiting That Jurisdiction.

1. Our system of government is based on separation of powers, with an independent Judiciary designed to check the excesses of other branches and protect individual rights. *See e.g., Commodity Futures Training Commission v. Schor*, 478 U.S. 833, 848 (1986). The drafters of the Constitution viewed equitable jurisdiction as an indispensable component in securing the independence of the Judiciary and, consequently, maintaining separation of governmental powers. Thus, our Constitution extends to the Judiciary the power to determine "all Cases, in Law and Equity, arising under [the] Constitution, the laws of the United States and Treatises made, or which shall be made, under their Authority . . . " U.S. Const. art. III, §2, cl. 1. Alexander Hamilton expounded on the importance of equitable jurisdiction to the Judiciary, in the *Federalist* papers:

> It has also been asked, what need of the word "equity"? What equitable causes can grow out of the constitution and laws of the United States? There is hardly a subject of litigation between individuals, which may not involve

> those ingredients of *fraud, accident, trust or hardship*, which would render the matter an object of equitable, rather than of legal jurisdiction, as the distinction is known and established in several of the states.
>
> *The Federalist* No. 80 at 406-07 (Alexander Hamilton) (Gary Wills ed. 1982).

Indeed, early decisions of this Court also recognize the role equity plays in maintaining the separation of powers and in securing an independent Judiciary. Over 150 years ago, Justice Johnson pointed out the indispensable nature of equitable jurisdiction to the Judiciary in *Lessee of Livingston v. Moore*, 32 U.S. (7 Pet.) 469, 547 (1833). He believed equitable jurisdiction to be essential to the exercise of judicial power, stating that "the means of exercising it, must exist somewhere; or the administration of justice will be embarrassed, if not incomplete."[1]

2. Equity, though vital to the Judiciary and separate of powers, is not unchecked. As is appropriate in a democracy, our Constitution delegates to Congress the ultimate say in what remedies, including equitable ones, lower federal courts may grant. U.S. Const. art. III, §1; *Glidden Co. v. Zdanok*, 370 U.S. 530, 557 (1962) (holding it consistent with Article III for Congress to limit the remedial powers of the federal court to an award of money damages); *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 329 (1938) (holding that Congress has the power to preclude the district court from issuing injunctions in the absence of specific findings).

In addition, this Court has been vigilant in protecting fundamental structures of our Constitution in the face of Congress'

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[1] *For further analysis see*, Brief for the Bi-State Development Agency of the Missouri - Illinois Metropolitan District as *Amicus Curiae* supporting Respondent at p. 7-8, *Meghrig v. KFC Western, Inc.*, No. 95-83 ("Amicus Curiae Brief").

express constitutional authority to alter them. One mechanism this Court has used to safeguard these constitutional structures has been the clear (or plain) statement rule. The clear statement rule was born, thus, to protect "the fundamental constitutional balance between the Federal Government and the States", in the face of Congress' express constitutional power to abrogate the States' Eleventh Amendment immunity.[2] Indeed, this Court held "that Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakenly clear in the language of the statute." *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 238, 242 (1985).

In *Delmuth v. Muth*, 491 U.S. 223, 227-28 (1989), this Court applied the "simple but stringent" clear statement test "[t]o temper Congress' acknowledged powers of abrogation with due concern for the Eleventh Amendment's role as an essential component of our constitutional structure." Similarly, in *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991), this Court applied a clear statement rule to protect the internal operations of a state government from Congress' constitutional authority to enact laws affecting those internal operations. Significantly, this Court stated in *Ashcroft* that the structure of state sovereignty in a federal system and separation of powers are of comparable value to our Republic. *Id.* at 458.

This Court has also enunciated a similar clear statement rule to protect separation of powers with respect to limitations on the traditional range of district courts' equitable powers. In *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946), this Court addressed the remedies available to a district court under a certain statute, the Emergency Price Control Act of 1942, ch. 26 §205 (a), 56 Stat. 33 (the "Price Control Act"). The Court created

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[2] *See* Amicus Curiae Brief, p. 8-9, n. 3 for information on academic literature discussing the clear statement rules.

a clear statement rule for determining the scope of relief afforded by statutes that allow resort to the district courts' equitable jurisdiction.

The Price Control Act's enforcement provision, Section 205(a), like RCRA's citizen suit provision, explicitly empowered the district court to enforce compliance with and to enjoin past and future violations of the Act. *Id.*, at 397. Like RCRA's citizen suit provision, Section 205 also empowered the district courts to issue "other orders", but did not specify that the term "other orders" included restitution. *Id.* Nevertheless, this Court held that the Price Control Act empowered the district courts to grant restitution in addition to other equitable remedies. *Id.* at 402.

Acknowledging the district courts' jurisdiction "to enjoin" and "to enforce" as within general grants of equitable jurisdiction, this Court expounded on the usual scope of equitable remedies available:

> Power is thereby resident in the District Court, in exercising this jurisdiction, "to do equity and to mould each decree to the necessities of the particular case." *Hecht Co. v. Bowles,* 321 U.S. 321, 329 (1944). It may act so as to adjust and reconcile competing claims and so as to afford full justice to all the real parties in interest; if necessary, persons not originally connected with the litigation may be brought before the court so that their rights in the subject matter may be determined and enforced. In addition, the court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice.

Porter, 328 U.S. at 398. This Court, then addressed Congress' power to limit the scope of the district court's equitable jurisdiction:

> [T]he comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.

Id.

This Court has reaffirmed this clear statement rule on eight separate occasions. *See California v. American Stores Co.*, 495 U.S. 271, 295 (1990); *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 542-46 (1987); *United States v. Rodgers*, 461 U.S. 677, 708 (1983); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982); *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979); *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 19-20 (1974); *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 290-91 (1960); *United States v. Moore*, 340 U.S. 616, 619 (1951).

Notably, on two of those occasions, this Court specifically held that even when Congress simply granted the district courts power to enter injunctions, the statute under consideration also empowered the district courts to grant restitution. *Moore*, 340 U.S. at 619-20; *Mitchell*, 361 U.S. at 296. The idea is that, as this Court pointed out in *Hecht*, 321 U.S. at 330, "if Congress desired to make . . . an abrupt departure from traditional equity practice . . . it would have made its desire plain."

Indeed, this Court and lower federal courts have applied the *Porter* clear statement rule in numerous regulatory settings. *See, e.g., American Stores*, 495 U.S. 271 (interpreting Clayton Act); *Amoco*, 480 U.S. 531 (interpreting Alaska National Interest Lands Conservation Act); *Weinberger*, 456 U.S. 305 (interpreting Federal Water Pollution Control Act); *Yamasaki*, 442 U.S. 682 (interpreting Social Security Act); *Bannercraft Clothing*,

415 U.S. 1 (interpreting Freedom of Information Act); *Mitchell*, 361 U.S. 288 (interpreting Fair Labor Standards Act of 1938); *Moore*, 340 U.S. 616 (interpreting Housing and Rent Act of 1947); *Porter*, 328 U.S. 395 (interpreting Emergency Price Control Act of 1942); *Reebok Int'l, Ltd. v. Marnatech Enters*, 970 F.2d 552, 561-62 (9th Cir. 1992) (interpreting Lanham Act); *Pierce v. Amaral*, 928 F.2d 94, 96 (8th Cir. 1991) (interpreting Interstate Land Sales Full Disclosure Act); *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989) (interpreting Securities Exchange Act of 1934); *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711, 718-19 (5th Cir.) (interpreting Federal Trade Commission Act), *cert. denied*, 456 U.S. 973 (1982).

Thus, the *Porter* clear statement rule is an integral part of our regulatory law.

3. In enacting RCRA's citizen suit provision, Congress specifically invoked the district court's equitable jurisdiction when it granted the courts the power to "restrain". Congress did not stop there, however; Congress also granted the courts the power to "order such person to take such other action as may be necessary." 42 U.S.C. §6972(a)(1)(B). This Court has twice stated that Congress is well aware of the principles encapsulated in the Porter rule. *American Stores*, 495 U.S. at 295; *Weinberger*, 456 U.S. at 313.

Congress did not make clear any intent to limit the district court's equitable jurisdiction in the RCRA citizen suit provision. The provision is devoid of preclusive language. In light of *Porter*, Congress' inclusion in RCRA's citizen suit provision of language invoking the district courts' equitable jurisdiction without expressly limiting the scope of that jurisdiction evinces an unambiguous intent to make the traditional equitable rem-

edies, including restitution, available to district courts addressing RCRA citizen suits.[3]

B. The District Court Properly May Grant Restitution Because That Remedy Furthers RCRA's Dual Statutory Purposes Of Promoting Prompt Remediation Of Contamination And Assuring That The Party Responsible For The Contamination Incur The Costs Of Remediation.

1. Congress left the Judiciary free to exercise its traditional equitable power to grant restitution, by failing to state clearly and unmistakenly in RCRA's citizen suit provision that the district courts are precluded from granting such relief. Before the district courts can grant restitution under a regulatory statute, however, this Court also requires that restitution further the purposes of the statute. *See Mitchell*, 361 U.S. at 291-92 ("When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes"); *Porter*, 328 U.S. at 400 (holding that, in fashioning equitable remedies under the Emergency Price Control Act, the district court "must act primarily to effectuate the policy of the Emergency Price Control Act"); *Hecht*, 321 U.S. at 331 (holding that the district court's equitable discretion to withhold or grant injunctive relief

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[3] This Court may find isolated statements in RCRA's legislative history suggesting that the district courts somehow are precluded from granting relief other than an injunction. This Court has held that such isolated statements are "beside the point." *Delmuth*, 491 U.S. at 230. As this Court explained in *Delmuth*, to satisfy the clear statement rule "evidence of congressional intent must be both unequivocal and *textual*." *Id.* (emphasis added). The Court continued, if Congress' intent is unmistakenly clear in the language of the statute, then recourse to legislative history is unnecessary; however, if Congress' intent is not unmistakenly clear, recourse to legislative history is futile, because by definition the clear statement rule is not met. *Id.*

under a regulatory statute must be exercised in light of the larger objectives of that statute).

Restitution furthers RCRA's purposes. Indeed, restitution presents the best option in furthering RCRA's purposes when, as in this case the current owner is required to remediate contamination caused by others.

Congress enacted the Resource Conservation and Recovery Act of 1976 (RCRA), Pub. L. No. 94-580, 90 Stat. 2795 (1976), as an amendment to the Solid Waste Disposal Act, 42 U.S. §§6901-6992(k) (1988). At the time, RCRA had a prospective focus. Congress designed RCRA to encourage parties to minimize waste production and require parties handling solid and hazardous waste to observe appropriate management practices to minimize environmental contamination resulting from waste handling and disposal. 42 U.S. §6902 (1988).

Congress first focused on the need to address retroactively the problems of facilities contaminated as a result of past treatment or disposal of hazardous substances in 1980, when Congress enacted the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), Pub. L. No. 96-510, 94 Stat. 2767 (1980), creating a retroactive, strict liability regime designed to promote prompt remediation and to assure that the "polluter pays." S.Rep.No. 848, 96th Cong., 2d. Sess. 33 (1980).

By the time Congress enacted the Hazardous and Solid Waste Amendments to RCRA in 1984, Pub. L. No. 98-616, 98 Stat. 3224 (1984) (HSWA), however, Congress apparently had realized that CERCLA would not succeed in promoting the prompt remediation of current and historical contamination problems associated with (1) all facilities engaged in the treatment, storage or disposal of hazardous waste, and (2) the improper management of petroleum underground storage tank systems. Congress specifically addressed these two problems in the HSWA amendments. With respect to preventing and remediating contamination problems associated with leaking, petroleum underground

storage tank systems, Congress included in the Hazardous and Solid Waste Amendments an entirely new subchapter outlining management and remediation procedures associated with petroleum underground storage tank systems. Pub. L. No. 98-616, Tit. IV, §601, 98 Stat. 3277-3288 (1984) (codified as amended at 42 U.S.C. §§6991-6991(I) (1988)).[4]

At the same time that Congress enacted these new provisions designed to ensure that the parties responsible for environmental contamination promptly clean-up such contamination, Congress also amended RCRA's citizen suit provision by adding §6972(a)(1)(B). Pub. L. No. 98-616, Tit. IV, §401, 98 Stat. 3268 (1984) (codified at 42 U.S.C. §6972(a) (1988)).

Through these provisions Congress added to RCRA's prospective management focus a retrospective remedial focus that encompasses CERCLA's environmental policy goals of promoting prompt remediation of contamination and of assuring that the responsible party pays.

2. Congress can be sure that both of its policy goals — the prompt clean-up of contamination and the shifting of costs to the culpable party — will be advanced only if district courts have the power to grant restitution to the current property owner who promptly cleans up the contamination. To understand why the availability of restitution plays a key role in facilitating Congress' dual policy goals, one simply needs to evaluate the options

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[4] With respect to contamination problems of treatment, storage and disposal facilities, Congress including in HSWA provisions authorizing the EPA to require "corrective action" at such facilities. Pub. L. No. 98-616, Tit. II, §206, 98 Stat. 3239 (1984) (codified at 42 U.S.C. §6924(u) (1988)), (requiring as a permit condition "corrective active for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage or disposal facility") and Pub. L. No. 98-616, Tit. II, §233, 98 Stat. 3257-58 (1984) (codified at 42 U.S.C. §6923(h) (1988)) (authorizing issuance of corrective action orders when "there is or has been a release of hazardous waste into the environment" from an interim status facility).

available to an innocent current property owner faced with a state clean up order.

Commonly, it is the state that seeks to compel innocent current property owners to remediate contamination resulting from the activities of a former property owner. If restitution is not available under RCRA's citizen suit provision, when a state makes such orders, the current property owner has almost no incentive to remediate the contamination promptly because it has no guarantee that it can recover its costs. Rather, the current property owner has every incentive to contravene one of Congress' goals — prompt remediation — to facilitate Congress' other goal — the imposition of costs on culpable parties. Instead of promptly remediating the property and incurring the associated costs of remediation, the current property owner has every incentive, including the availability of attorney's fees, to delay remediation while pursuing a citizen suit action under RCRA directed toward obtaining an order that will force the former owner to remediate the contamination. As the situation currently exists in Missouri, the only way that an aggrieved party can shift the cost of remediation to the culpable party is to file its lawsuit first, clean-up later.[5]

In addition, the assistance of possible state common law claims for damages, such as nuisance, trespass, indemnification, misrepresentation and breach of warranty, provide little incentive for the current property owner to promptly remediate the property. *See Meghrig v. KFC Western, Inc.*, 49 F.3d 518, 523 and n.6 (9th Cir. 1995). Particularly given the uncertainty of

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[5] In the present case, Petitioner did not have this option. The property was being used as a component of the MetroLink Light Rail System. There were severe time limitations. Waiting to clean-up until after a lawsuit was filed was not possible. Indeed, crucial federal funding could have been sacrificed in the process. Very simply, the facts do not support the notion that Petitioner had the option to stop and file its claim against the culpable party prior to remediation.

recovery under fact dependent causes of action such as nuisance, trespass and misrepresentation, none of which are designed to provide restitution in this instance. Add to this fundamental problem potential statute of limitation defenses, difficulties of proof and the current owner's obligation to absorb all costs associated with the litigation, and the factors weigh heavily against even the possibility of recovery under common law theories. Indeed, as the ninth circuit observed, state common law remedies are woefully lacking. *Id.*

Accordingly, if district courts do not have the authority to grant restitution under RCRA's citizen suit provision, current property owners nonetheless will make use of RCRA's citizen suit provision, but will do so in a way that promotes only one of Congress' policy goals, shifting the costs of remediation to culpable parties. This result will be at the expense of Congress' other policy goal, assuring prompt remediation. By contrast, if restitution is available under RCRA's citizen suit provision, when a state orders an innocent current property owner to remediate the property, the innocent current property owner has an incentive to remediate promptly because it can be confident that it can shift the cost of remediation to the culpable party and seek the recovery of attorneys' fees. Consequently, the availability of restitution is essential to satisfying Congress' dual policy goals of prompt remediation and of assuring that the responsible party incurs the costs of remediation.

II.

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE CIRCUITS RELATIVE TO THE APPLICATION OF THE CLEAR STATEMENT RULE IN INTERPRETING RCRA'S CITIZEN SUIT PROVISION.

The question before the court of appeals in this case was whether the remedy of restitution is available under the RCRA

citizen suit provision; and not whether there is an implied right of action under RCRA. The court of appeals applied the *Cort v. Ash*, 422 U.S. 66 (1975) test in making this determination, and subsequently dismissed this case based on its application. *See*, App. at A-1, and *Furrer*, 62 F.3d 1092; App. at A-6. While the *Cort v. Ash* analysis may be the appropriate test to determine whether a statute implies a right of action, *Cort v. Ash* is not the appropriate test in this case. Rather, this Court has repeatedly held that the "question of what remedies are available under a statute that provides a private right of action is analytically distinct from the issue of whether such a right exists in the first place." *See e.g., Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 112 S.Ct. 1028, 1032 (1992); *see also, Davis v. Passman*, 442 U.S. 226 (1979); *Liberman v. University of Chicago*, 660 F.2d 1185 (7th Cir. 1981). *Cort v. Ash* does not bear on the issue of whether a particular remedy is available, therefore, the court of appeals' protracted analysis applying the *Cort v. Ash* test to divine Congress' intent regarding the availability of restitution is misplaced.

Rather, as stated above, the clear statement rule controls in this matter and should be applied in this case. According to this Court, the comprehensiveness of equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. *Supra.* at pp. 10-14. This important cannon of construction has been reaffirmed and applied in numerous decisions of this Court. *Supra.* at p. 12. As stated above, restitution is available as a remedy in this case. The court of appeals erred by applying the wrong test, and consequently, as explained throughout this brief, inappropriately restricted the district courts' equitable jurisdiction under RCRA's citizen suit provision.

In holding that the remedy of restitution is not available, the court of appeals for the eighth circuit created a conflict in the circuits. The contrary decision is currently on appeal before this

Court in a case styled *Meghrig v. KFC Western,* Inc., No. 95-83, originating in the ninth circuit. Therefore, it is appropriate for this Court to act on this Petition for Writ to resolve the conflict. Indeed, the issue presented in this case is virtually identical to one issue in *Meghrig*[6] and another case currently on Petition for Writ of Certiorari styled *Furrer v. Brown*, filed on January 12, 1996.

CONCLUSION

The Court should postpone consideration of this Petition pending the Court's disposition of the *Meghrig v. KFC Western, Inc.,* No. 95-83, which raises the identical issue of whether restitution is an available remedy under RCRA's citizen suit provision. Following this Court's ruling in No. 95-83, the Court should dispose of this case in light of that ruling. However, if the court does not reach the issue regarding the scope of equitable remedies available under RCRA's citizen suit provision in *Meghrig v. KFC Western, Inc.,* this issue is ripe for the Court's consideration.

Alternatively, the Court should consolidate this Petition with *Meghrig v. KFC Western, Inc.*, addressing the scope of equitable remedies available under RCRA's citizen suit provision.

Respectfully submitted,

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[6] This case does not include the jurisdictional issue. *See supra.* at p. 7.

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-2054

Bi-State Development Agency of the
Missouri-Illinois Metropolitan District,

Appellant,

v.

Abbott Ambulance, Inc.,

Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri.

[UNPUBLISHED]

Submitted: November 2, 1995
Filed: November 13, 1995

Before FAGG and BOWMAN, Circuit Judges, and BENNETT,* District Judge.

PER CURIAM.

This Court recently has held that there is no implied private rights of action to recover past cleanup costs under § 6972 of the Resource Conservation and Recovery Act. *See Furrer v. Brown,* 62 F.3d 1092 (8th Cir. 1995). That holding is now the law of this Circuit and is dispositive here. Accordingly, the judgment of the District Court is affirmed. *See* 8th Cir. R. 47B.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS

EIGHTH CIRCUIT

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[1] The HONORABLE MARK W. BENNETT, United States District Judge for the Northern District of Iowa sitting by designation.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:94CV859 TIA

BI-STATE DEVELOPMENT AGENCY OF THE MISSOURI-ILLINOIS METROPOLITAN DISTRICT,
Plaintiff,

v.

ABBOTT AMBULANCE, INC.,
Defendant.

JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff's claims for relief are DISMISSED.

/s/ Terry I. Adelman
TERRY I. ADELMAN
UNITED STATES
MAGISTRATE JUDGE

Dated this 27th day of March, 1995.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:94CV859 TIA

BI-STATE DEVELOPMENT AGENCY OF THE MISSOURI-ILLINOIS METROPOLITAN DISTRICT,
Plaintiff,

v.

ABBOTT AMBULANCE, INC.,
Defendant.

MEMORANDUM AND ORDER

This matter is before the undersigned on defendant's Motions to Dismiss and for Attorney Fees. The parties consented to try their case before the undersigned pursuant to 28 U.S.C. §636(c).

Plaintiff's eight count complaint seeks restitution of money expended in the cleanup of property acquired from defendant. Plaintiff asserts that during negotiations for the sale of the property, defendant failed to disclose that certain waste tanks were buried on the property, or that the tanks were leaking. After discovering the tanks, plaintiff allegedly expended over $260,050.00 in examination, removal, disposal and clean-up costs.

Court I of plaintiff's complaint is a claim for abatement costs pursuant to Section 7002 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. 6972(a) (the "citizen's suit provision). The remaining claims arise under Missouri law.

Defendant moves to dismiss plaintiff's complaint, arguing in part that the RCRA does not authorize a private cause of action for restitution. Defendant also asserts that plaintiff's state law claims are barred by *res judicata*.

Although the Eighth Circuit has yet to address the issue of whether § 6792 authorizes private claims for restitution, two courts in this district have recently ruled in support of defendant's position. *Furrer, et al., v. Brown,* 4:93CV2276 CEJ, (E.D. Mo. August 4, 1994) (rejecting plaintiff's description of its private RCRA claim for restitution as "equitable" and holding that RCRA does not authorize a plaintiff to recover past remediation costs); *Yellow Freight System, Inc. v. ACF Industries, Inc.,* No. 4:92CV2585 CAS (E.D. Mo. July 9, 1994) (dismissing RCRA claim on the basis that there is no private action for damages under RCRA).

The decisions reached in *Furrer* and *Yellow Freight* are supported by the vast majority of courts considering this issue. *Commerce Holding Company v. Buckstone,* 749 F.Supp. 441, 445-46 (E.D.N.Y. 1990); *Portsmouth Redevelopment and Housing Authority v. BMI Apartments Associates,* 847 F.Supp. 380, 385 (E.D. Va. 1994); *Gache v. Town of Harrison,* 813 F.Supp. 1037, 1045 (S.D.N.Y. 1993); *Kaufman and Broad-South Bay v. Unisys Corporation,* 822 F.Supp. 1468, 1477 (N.D.Cal. 1993); *Dominick's Finer Foods, Inc. v. Amoco Oil Company,* 1993 WL 524508, at n.5 (N.D. Ill. 1993); and *Walls v. Waste Resource Corp.,* 761 F.2d 311, 316 (6th Cir. 1985); *Polcha v. AT & T Nassau Metals,* 837 F.Supp. 94, 96 (M.D. Pa. 1993).[1]

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[1] The undersigned notes that the recent decision of *KFC Western, Inc. v. Meghrig,* ___ F.3d ___, 1995 WL 81766 (9th Cir. March 1, 1995) reaches the opposite conclusion. In *KFC Western,* the Ninth Circuit cites *Aceto Agric. Chemicals Corp.,* 872 F.2d 1373 (8th Cir. 1989) for the rule that the Administrator of the Environmental Protection Agency may sue for the equitable restitution of costs pursuant to 42 U.S.C. § 6793. The Court then reasons that since §§ 6792 and 6793 are similarly worded, that restitution suits by private plaintiffs should also be allowed. The Court is hesitant to adopt the Ninth Circuit's analysis for several reasons.

First, while the *Aceto* case allowed the EPA Administrator to pursue a claim for restitution under §6793, the defendant apparently had not raised

(Footnote 1 continued on next page)

Since this Court does not have jurisdiction over a "citizen's suit" seeking restitution pursuant to 42 U.S.C. § 6792(a), defendant's Motion to Dismiss will be granted in regard to plaintiff's RCRA claim. In addition, the undersigned will decline to exercise supplemental jurisdiction over the remaining counts. Accordingly, there is no need to decide whether plaintiff's state law claims are barred by *res judicata.* The Court will not grant defendant's Motion for Attorney Fees, however, because this issue was a matter of first impression in this district at the time plaintiff filed its case.

IT IS HEREBY ORDERED that defendant's Motion to Dismiss (#6) is GRANTED.

IT IS FURTHER ORDERED that defendant's Motion for Attorney Fees (#10) is DENIED.

/s/ Terry I. Adelman
TERRY I. ADELMAN
UNITED STATES
MAGISTRATE JUDGE

Dated this 27th day of March, 1995.

(Footnote 1 continued)

the issue of whether the statute authorized such a claim. Thus, the Eighth Circuit assumed without deciding that a restitution claim was available to the Administrator. Further, RCRA specifically provides for recovery of costs by the Administrator in § 6991b(6)(A). There is no such provision in the RCRA for recovery of costs by private citizens. Finally, until the Eighth Circuit specifically decides this issue, the undersigned feels compelled to follow the weight of authority and the opinions of other judges in this district.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-3281

J. Richard Furrer; Margaret L. Furrer,
Appellants,

v.

Donald F. Brown; Dorothy J. Brown; Louis W. Fagas;
Geraldine J. Fagas; Shell Oil Company,
Appellees

Unknown Does, 1-100
Defendant.

State of Missouri; Bi-State Development Agency;
United States of America,
Amicus Curiae.

Appeal from the Unites States District Court
for the Eastern District of Missouri.

Submitted: April 12, 1995
Filed: August 15, 1995

Before FAGG and BOWMAN, Circuit Judges, and BENNETT,* District judge.

BOWMAN, Circuit Judge.

J. Richard Furrer and Margaret L. Furrer appeal from an order of the District Court[1] granting the separate motions to dismiss

* The HONORABLE MARK W. BENNETT, United States District Judge for the Northern District of Iowa, sitting by designation.

[1] The Honorable Carol E. Jackson; United States District Judge for the Eastern District of Missouri.

filed by Donald F. Brown, Dorothy J. Brown, Louis W. Fagas, and Geraldine Fagas, and by Shell Oil Company, on the Furrers' claim brought under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6987 (1988 & Supp. V 1993), to recover costs incurred in cleaning up soil contamination caused by leaking underground gasoline storage tanks located at the property known as 4701 Gravois Avenue, St. Louis, Missouri. We affirm.

I

The Furrers own the Gravois Avenue property. The Browns and Fagases were owners of the site at times before the Furrers acquired the property, and Shell Oil Company at one time was lessee of the property and operated a service station there. The Furrers became aware in 1991 that the property was contaminated by petroleum, and they "were ordered to remediate the contamination by the Missouri Department of Natural Resources" (MoDNR). Complaint at ¶ 16,*Furrer v. Brown*, No. 4:93-CV-2276 (E.D. Mo. filed Oct. 22, 1993).

The Furrers sought to recover their remediation costs from the Browns, the Fagases, and Shell Oil, appellees here, alleging federal jurisdiction pursuant to 42 U.S.C. § 6972 (1988). Besides a RCRA count, the Furrers asserted three state common law theories of recovery. The District Court granted the appellees' motions to dismiss, holding that the court did not have subject matter jurisdiction over the federal claim, and declining to exercise supplemental jurisdiction over the state law claims. The Furrers appeal. Because the dismissal for lack of subject matter jurisdiction was granted without reference to matters outside the pleadings, the appeal presents a question of law that we review *de novo*.[2] *See Christopher Lake Dev. Co. v. St. Louis County*, 35 F.3d 1269, 1273 (8th Cir. 1994).

[2] We ordered taken with the case, and now grant, appellees' motions to strike the Furrers' "Supplemental Appendix," which was filed appended to their reply brief.

II.

The statute under which the Furrers invoked federal court jurisdiction is RCRA's citizen suit provision, and reads in pertinent part as follows:

> Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf—
>
> . . .
>
> (B) against any person . . . including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment;
>
> . . . .
>
> . . . The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce [permits and other such requirements], to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste . . ., *to order such person to take such other action as may be necessary,* or both. . . .

42 U.S.C. § 6972(a)(1)(B) (1988) (emphasis added).

Section 6972 gives the federal courts subject matter jurisdiction to hear citizen suits where specific equitable remedies are sought: prohibitory or mandatory injunctive relief "to enforce," "to restrain," and "to order . . . other action . . . necessary." The statute does not give the district courts express authority in

citizen suits to award money judgments for costs incurred in cleaning up contaminated sites. Thus, if such a remedy is to be available, we must find either that Congress, by authorizing the district court "to order . . . such other action as may be necessary," *id.*, implicitly created such a remedy, or that the "cause of action . . . may have become a part of the federal common law through the exercise of judicial power to fashion appropriate remedies for unlawful conduct." *Northwest Airlines, Inc. v. Transport Workers Union of Am., AFL-CIO*, 451 U.S. 77, 90 (1981). Federal common law is not an issue in this case[3] and as explained in the discussion that follows we reject § 6972 as a source of federal jurisdiction for the Furrers' cause of action.

When considering the possibility that it was Congress's intent to authorize a monetary remedy for private citizens when it enacted § 6972, or, more precisely, when it amended the statute in 1984,[4] we are guided by the teachings of the Supreme Court. The "familiar test" of *Cort v. Ash*, 422 U.S. 66 (1975), which places "the burden . . .. on [the Furrers] to demonstrate that

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[3] In what was evidently intended as a preemptive strike, Shell raises in its brief to this Court (and then proceeds to argue against) the possibility that federal common law is an issue in this case. Shell contends that, because there is no statutory cause of action, federal common law is the only possible source of federal jurisdiction, but then argues there is no authority for a federal common law cause of action. In reply the Furrers, insisting that the remedy they seek is statutory, apparently agree with Shell: "There is no issue of general common law jurisdiction presented by" § 6972. Reply Brief of Appellants at 9. The Furrers have pinned their hopes on the statute, and they do not assert any theory of recovery based on federal common law, so we need not and do not discuss that source of authority.

[4] In 1984 Congress changed the language detailing the relief that the district court was empowered to grant from "to enforce such regulation or order, or to order the Administrator to perform such act or duty as the case may be, " 42 U.S.C. § 6972(a) (1982), to the present language, quoted above. Clearly the 1984 amendment expanded the available remedies; the question is the degree to which it did so.

Congress intended to make a private remedy available" such as the one the Furrers seek,[5] *Suter v. Artist M.*, 503 U.S. 347, 363 (1992), sets out four factors relevant to the search for an implied cause of action. First, we look at the statute to determine if the Furrers are in the class for whose benefit the statute was enacted, and then at the legislative history to see if it explicitly or implicitly shows an intent to create or deny the cause of action. *Cort*, 422 U.S. at 78. Third, we examine the proposed remedy in the context of the purpose of the statutory scheme, and finally we consider whether the cause of action is one traditionally a matter of state law, so that inferring a federal remedy would be inappropriate. *Id.*

A.

As discussed above, § 6972 on its face does not provide for the recovery of remediation costs by way of a citizen suit.[6] Never-

[5] The Furrers' brief demonstrates their fundamental misunderstanding of this analysis. They contend that the lack of a federal common law issue in this case, *see supra* note 3, obviates the need for a review of the factors from *Cort v. Ash*, 422 U.S. 66 (1975). Somehow they understand the *Cort* analysis—despite its emphasis on discerning what Congress intended when enacting a statute—to be a search for a cause of action in the federal common law. The *Cort* decision, however, examined a federal statute for an implied cause of action—which is what the Furrers are asking us to find here. Although federal common law theories of recovery are not relevant to this case, the *Cort* factors are.

[6] We resolve this appeal on the question of whether the cause of action for recovery of cleanup costs is available under § 6972(a)(1)(B) and pretermit other issues raised by the parties. The District Court concluded, and the appellees urge, that the Furrers did not allege the required "imminent and substantial endangerment to health or the environment" required by § 6972, since the site already has been cleaned up. We do not decide that issue. In its appellee's brief, Shell argues that petroleum leaks from underground storage tanks are not hazardous wastes within the meaning of § 6972; the United States as *amicus curiae* takes the opposite position. It is also unnecessary for us to resolve this question. Other *amici*, the State of Missouri and the Bi-State Development Agency of the Missouri-Illinois Metropolitan District, in their briefs take the Furrers' position on the issue on which we do resolve the case.

theless, Congress's failure to include express authority for the district court to award monetary relief, "although significant, is not dispositive if, among other things, the language of the statutes indicates that they were enacted for the special benefit of a class of which [the plaintiff] is a member." *Northwest Airlines,* 451 U.S. at 91-92 (footnote omitted). Clearly, the Furrers as "citizens" are among the "any persons" who are authorized to bring suit for enforcement of RCRA's permits and regulations. The "benefit" of RCRA, however, inures to all citizens of the United States, and § 6972 confers upon each of those beneficiaries the right to bring suit in the federal courts to compel enforcement of RCRA's provisions. Neither RCRA generally nor § 6972 specifically was enacted for the "special benefit" of those owners of property who pay to remediate soil contamination that has resulted from leaking underground gasoline storage tanks and for which they claim no responsibility. In fact, a persuasive argument can be made that the Furrers are in a class of persons that RCRA and § 6972 are directed *against* — the owners of a storage facility where hazardous waste has presented an imminent and substantial endangerment.*See id.* at 92 (declining to infer cause of action for employer to seek contribution from union under the Equal Pay Act and Title VII where "both statutes are expressly directed against employers"). We conclude that the language of § 6972—benefiting the citizenry of the United States generally and endowing the federal courts with subject matter jurisdiction for a suit brought by "any person"—demonstrates that it was not enacted for the "special benefit" of those in the Furrers' circumstances.

The Furrers argue that Congress, by giving the federal courts seemingly broad jurisdiction "to order [parties who have contributed to the contamination] to take such other action as may be necessary," intended a person who has incurred remediation costs to have a cause of action under § 6972 to recover those costs from the responsible parties. The Furrers characterize this recov-

ery as "equitable restitution" and ask that we find it to be a remedy within the scope of the statute.

We think the Furrers read too much into the phrase "to take such other action as may be necessary." Giving the language a natural, unstrained reading, it appears to authorize federal courts to grant mandatory injunctive relief, that is, to order the responsible party to take action: to investigate a site, to remediate a site, and so forth. We do not think that "such other action as may be necessary" contemplates the payment of money to a party who already has cleaned up a contaminated site. Similarly, jurisdiction "to enforce" or "to restrain" does not encompass the authority to award monetary relief. "[W]hen legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies."*Universities Research Ass'n, Inc. v. Coutu*, 450 U.S. 754, 773 n.24 (1981) (quoting *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974)); *accord Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979) ("Yet it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.").

As the Supreme Court repeatedly has said, we are to begin with "the statutory language, particularly . . . the provisions made therein for enforcement and relief" when determining "whether Congress intended to create a private right of action under a federal statute without saying so explicitly."*Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981);*see also Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979), and cases cited therein. The Furrers argue that the authority "to order . . . such other action" must include the full range of equitable remedies, including the restitution they claim. Assuming without deciding that it is equitable restitution that the Furrers seek (it looks to us suspiciously like money damages),

we think that even a cursory look at federal environmental legislation demonstrates that "Congress knows how to define a right to contribution" in this area of the law. *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 n.11 (1981). The examples that follow support our conclusion that Congress could have written § 6972 to include the remedy the Furrers seek, having clearly provided for it elsewhere in federal environmental law, and deliberately did not do so in this instance.

Congress demonstrated its faculty for writing a statute to include a cause of action for recovery of cleanup costs when it drafted RCRA. Within that legislation, Congress provided that the administrator of the Environmental Protection Agency (EPA) or a state could recover from the owner or operator of an underground storage tank the costs incurred "for undertaking corrective action or enforcement action with respect to the release of petroleum from" such a tank. 42 U.S.C. § 6991b(h)(6)(A) (1988). Notably, Congress authorized no such recovery for present owners and operators against previous owners and operators who are responsible for petroleum leaks from underground storage tanks.[7]

Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993), a later-enacted major federal environmental act, Congress provided that "[a]ny person may seek contribution from any other person who is liable or potentially liable" for response costs. 42 U.S.C. § 9613(f)(1) (1988). This cause of action for contribution is in addition to CERCLA's citizen suit statute, which, much like the RCRA citizen suit statute, provides that any person may bring a civil action in federal court and gives the district court authority to enforce CERCLA regulations and "to order such action as may be

[7] We do not intend by this discussion to imply any views on the question whether petroleum leaking from underground storage tanks is hazardous waste within the meaning of § 6972. *See supra* note 6.

necessary to correct the violation" of a CERCLA standard or requirement. *Id.* § 9659(c) (1988). Congress, knowing its CERCLA citizen suit provision did not extend the available remedies to include a cause of action for monetary recovery from other responsible parties, despite the broad "other action" language (which is also found in the RCRA citizen suit provision), and wishing to allow such a remedy in certain cases, enacted § 9613(f)(1) to provide expressly for contribution.[8]

Section 6972 is specific about the relief available under the statute. By its language, the statute authorizes injunctive relief, whether prohibitory (to stop generating hazardous waste) or mandatory (to comply with permits or regulations or to clean up hazardous waste). In other federal environmental legislation, Congress authorized suit for similar injunctive relief, but then specifically gave federal courts authority to hear claims for monetary recovery as well. "The comprehensive character of the remedial scheme expressly fashioned by Congress strongly evidences an intent not to authorize additional remedies." *Northwest Airlines*, 451 U.S. at 93-94.

B.

Although we are tempted to regard our discussion under Part IIA, *supra*, as dispositive of this case, fidelity to *Cort* requires that we next look at the legislative history of the 1984 amendment to § 6972 (clarifying the remedies available in citizen suits, *see supra* note 4) to see if we can discern any congressional intent regarding the remedy the Furrers seek. "Even settled rules of statutory construction could yield, of course, to persuasive evidence of a contrary legislative intent." *Transamerica Mort-*

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[8] Presumably the Furrers did not bring this suit for contribution under CERCLA because CERCLA's definition of "hazardous substance" excludes "petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance." 42 U.S.C. § 9601(14) (1988).

gage Advisors, 444 U.S. at 20. But as is to be expected, because the statute did not "expressly create or deny" the remedy the Furrers seek, the legislative history is "equally silent or ambiguous on the question." *Northwest Airlines*, 451 U.S. at 94 (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 694 (1979)). While there is no indication in the legislative history that Congress intended to deny the recovery of cleanup costs under § 6972, by the same token there is no evidence that Congress intended to create such a remedy, and "implying a private right of action on the basis of congressional silence is a hazardous enterprise, at best." *Touche Ross*, 442 U.S. at 571.

C.

Finding no congressional intent to create a private cause of action for the recovery of cleanup costs manifest in either § 6972 or its legislative history, we might, and probably should, end the inquiry here. *See California v. Sierra Club*, 451 U.S. 287, 298 (1981) (noting that the last two *Cort* factors "are only of relevance if the first two factors give indication of congressional intent to create the remedy"). But out of an abundance of caution we nevertheless have considered the third factor, the underlying purpose of the statute and the structure of the federal environmental statutory scheme, and we conclude that the remedy sought is not "necessary to make effective the congressional purpose" of § 6972. *Cort*, 422 U.S. at 84 (quoting *J. I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964)).

RCRA itself states that the objectives of the Act "are to promote the protection of health and the environment and to conserve valuable material and energy resources," and then sets forth eleven routes to that goal, none of which relate specifically to the citizen suit provision. 42 U.S.C. § 6902(a) (1988). The "national policy" statement accompanying the Act addresses only the reduction or elimination of "the generation of hazardous waste . . . as expeditiously as possible," and the appropriate treatment, storage, or disposal of "[w]aste that is nevertheless

generated," but does not speak specifically to already contaminated property or its remediation. *Id.* § 6902(b). The citizen suit provision itself "permits individuals to commence an action in district court to *enforce waste disposal regulations* promulgated under" RCRA. *Hallstrom v. Tillamook County*, 493 U.S. 20, 22 (1989) (emphasis added). The overriding purpose of RCRA is clear: to prevent generation of hazardous waste in the first place, and to dispose of and treat properly that which is produced. In other words, RCRA's goal is to prevent the creation of hazardous waste sites, rather than to promote the cleanup of existing sites.

Looking at § 6972, we see that, notwithstanding the inclusion of this citizen suit provision in RCRA, the statute has provisions whose obvious goal it is to forestall citizen suits so that they become available only as a last resort. The § 6972 plaintiff must give sixty days notice to the EPA, the state, and the alleged violator before bringing suit. 42 U.S.C. § 6972(b)(1)(A) (1988). The purpose of the notice requirement is to "allow[] Government agencies to take responsibility for enforcing environmental regulations, thus obviating the need for citizen suits," and to give the reputed violator the opportunity to correct his behavior so that it conforms with RCRA.*Hallstrom* 493 U.S. at 29. Citizen suits are further discouraged by the very statute that authorizes them, because a person may not commence a § 6972 suit if the EPA or the state has initiated and is "diligently prosecuting" an enforcement suit (although a citizen may intervene in such a suit in federal court). 42 U.S.C. § 6972(b)(1)(B) (1988). It is apparent that, while Congress intended to allow citizen suits in order to foster compliance with RCRA's regulations, it wrote § 6972 to discourage citizen suits when compliance is at hand.

The legislative history of the 1984 amendment to § 6972 supports our conclusion that Congress intended the section to further the enforcement of RCRA regulations, that is, the regulation of hazardous waste, and did not intend to give citizens a cause of action for recovery of costs incurred for the cleanup of

hazardous waste sites when regulation has failed. "[T]he legislative history indicates an intent to strike a balance between encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with excessive numbers of citizen suits." *Hallstrom*, 493 U.S. at 29.

According to the House Report, the 1984 amendment "confers on citizens a *limited right* under [§ 6972] to sue *to abate* an imminent and substantial endangerment." H.R. Rep. No. 198, 98th Cong., 2d Sess., pt. 1, at 53 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5612 (emphasis added). This language makes it clear that we should not be inclined to add to the list of remedies found in the statute.[9] A cause of action "to abate" is a suit for an injunction—whether prohibitory to stop the generation of hazardous waste or mandatory to compel compliance with RCRA regulations. There is no indication that § 6972 as amended was intended to expand citizens' remedies to include the recovery of cleanup costs.

The comprehensive structure of federal environmental legislation in general, as discussed *supra*, at 7-8, also cautions against inferring a monetary remedy under § 6972. Numerous statutes that specifically authorize actions with such a remedy are already in place, further evidencing that the purpose of § 6972 was something else altogether.

The Furrers contend that allowing a cause of action to recover cleanup costs from those who have contributed or are contributing to contamination effectuates the purpose of RCRA and is an appropriate remedy within the rubric of § 6972's "other action . . . necessary." As the argument goes, citizens like the Furrers will be encouraged to abate contamination voluntarily, because

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[9]The minority views on the bill reflect a similar understanding of a RCRA citizen suit: that it is "intended to be an emergency type action to abate imminent hazards." H.R. Rep. No. 198, 98th Cong., 2d Sess., pt. 1, at 119 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5635.

they then can sue under § 6972 to recover remediation costs for which they are not equitably responsible.

We cannot deny that the Furrers' argument has a considerable surface appeal. We are mindful, however, that abatement of a hazardous waste spill can be ordered in diverse circumstances by a variety of federal and state authorities, and that liability for the remediation of contaminated property attaches, without regard to fault, to the then owner of the property. Thus, regardless of their ability to bring suit to recover costs expended in remediating a contaminated site, owners will clean up the waste—or they will be sued and forced to do so—and the goal of the abatement will be served. The Furrers have alleged that they cleaned up the Gravois Avenue property because they were ordered to do so by the MoDNR, not because they knew they could recover their costs from the appellees. In the circumstances, we think it disingenuous of the Furrers to suggest that the remediation of the Gravois Avenue site might have been motivated by a federal remedy to recover cleanup costs, especially given the doubtful availability of that remedy. And as a general proposition we believe that it is the threat of criminal or civil sanctions that hasten a cleanup such as the one undertaken by the Furrers, not a belief that, under RCRA, remediation costs can be recovered from previous owners or users of the property.

In conclusion, we cannot say that the purposes of environmental law and of § 6972 would be served by providing for a monetary remedy in a citizen suit under § 6972. Thus the third *Cort* factor provides no assistance to the Furrers.

D.

We come now to the fourth *Cort* factor, which focuses on the relationship between federal law and state law and asks whether "the cause of action [is] one traditionally relegated to state law, in an area basically the concern of the States." *Cort*, 422 U.S. at 78. If so, it would be inappropriate to find an implied federal

cause of action. Having concluded, based on our analysis of the first three *Cort* factors, "ones traditionally relied upon in determining legislative intent," *Touche Ross*, 442 U.S. at 576, that Congress did not intend to incorporate within § 6972 an implied remedy for the recovery of cleanup costs, the fourth factor in the inquiry would seem to hold little, if any, significance. *See id.* at 575; *California v. Sierra Club*, 451 U.S. at 298 (stating that the last two *Cort* factor are irrelevant unless "the first two factors give indication of congressional intent to create the remedy"). Even so, we have considered this final *Cort* factor and have concluded, notwithstanding that the general subject matter of § 6972 may not be an area primarily of state concern, that this factor, like the others, affords no basis for finding in § 6972 an implied cause of action for the recovery of cleanup costs.

Section 6972 has a savings clause, which preserves a person's rights "under any statute or common law . . . to seek any other relief." 42 U.S.C. § 6972(f) (1988). The legislative history of the 1984 amendment to § 6972 reflects a debate in the House about the extent to which federal courts should assume jurisdiction over preserved supplemental state law claims. The majority committee report evidences an expectation that, the savings clause notwithstanding, courts will "exercise their discretion concerning pendent jurisdiction in a way that will not frustrate or delay the primary goal of this provision, namely the prompt abatement of imminent and substantial endangerments." H.R. Rep. No. 198, 98th Cong., 2d Sess., pt. 1, at 53 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5612. The committee minority wished to strip federal courts of jurisdiction to hear any supplemental state law claims brought with RCRA citizen suits. The minority was concerned that allowing adjudication of state claims with § 6972 suits would unduly burden the federal courts and slow down the primary goal of the statute: the abatement of imminent hazards. "Instead of ending the imminent hazard, federal judges will be trying to decide cumbersome questions of state law nuisance, trespass, and personal and property damage

compensation." *Id.* at 119, *reprinted in* 1984 U.S.C.C.A.N. at 5635. Clearly all committee members had concerns (although to different degrees) about federal courts losing focus and concentrating on peripheral issues related to state claims—such as apportioning fault so as to award contribution—instead of acting quickly to abate imminent hazards. Given the specific reservation of state remedies in § 6972(f), and given congressional concern that citizen suits not become bogged down in the quest for private state law remedies (such as the recovery of cleanup costs), we think that this is at best a neutral factor and does nothing to advance the case for finding an implied federal cause of action for the recovery of cleanup costs.

E.

In sum, none of the four *Cort* factors tips the scales in favor of implying in § 6972 a cause of action to recover cleanup costs. In any event, as we intimated above, the *Cort* analysis no longer involves a balancing of the four factors; they now serve only as "guides to discerning" congressional intent.[10] *Thompson v. Thompson*, 484 U.S. 174, 179 (1988). "The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action." *Touche Ross*, 442 U.S. at 575. In none of the factors do we find a basis for imputing to Congress the intent to create in § 6972 an implied private cause of action for the recovery of cleanup costs.

III.

The Furrers commend to us the Ninth Circuit's opinion in *KFC Western, Inc. v. Meghrig*, 49 F.3d 518 (9th Cir. 1995),

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[10] Justices O'Connor and Scalia would require "an actual congressional intent to create a private right of action," and believe the *Cort* analysis has been "effectively overruled" by subsequent Supreme Court opinions. *Thompson v. Thompson*, 484 U.S. 174, 188 (1988) (Scalia, J., concurring); *see also Roberts v. Wamser*, 883 F.2d 617, 623 n.17 (8th Cir. 1989) (questioning "the continued validity of the *Cort* analysis for determining the existence of private rights of action").

petition for cert. filed (July 13, 1995) (No. 95-83), and urge that we follow the reasoning of the majority in that case. In a split decision, the court held that § 6972(a)(1)(B) gives the district court jurisdiction over private actions for the recovery of clean-up costs. We think, however, that the court began with a questionable proposition and then mistakenly reached its result in reliance on cases from this Circuit that, when carefully analyzed, do not support the *KFC Western* decision.

In § 6973, entitled "Imminent hazard," Congress has given the EPA administrator this authority:

> Notwithstanding any other provision of this chapter, upon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court against any person . . . who has contributed or who is contributing to such handling, storage, treatment, transportation or disposal to restrain such person from such handling, storage, treatment, transportation or disposal, to order such person to take such other action as may be necessary, or both.

42 U.S.C. § 6973(a) (1988). The *KFC Western* court summarily states that, "[b]ecause Congress intended that citizen suits be governed by the same standards of liability as governmental actions, and because it worded the provisions almost identically, we choose to interpret similarly the relief available under the two provisions." *KFC Western*, 49 F.3d at 521-22 (footnote omitted). The only support cited for the first part of that proposition is legislative history that, according to the court, "suggests" that suits under the citizen suit provision and the similar EPA suit provision were intended to parallel one another. According to the court, "[n]othing indicates that Congress intended citizen suits to serve a purpose different from that served by governmental

actions." *Id.* at 521 n.3. But it is a *non sequitur* that the remedies available to the respective plaintiffs must be the same.

The language in the legislative history upon which the Ninth Circuit (and the Furrers) rely is this: "[The 1984 amendment to § 6972] confers on citizens a limited right under [§ 6972] to sue to abate an imminent and substantial endangerment pursuant to the standards of liability established under [§ 6973]." H.R. Rep. No. 198, 98th Cong., 2d Sess., pt. 1, at 53 (1984), *reprinted in*, 1984 U.S.C.C.A.N. 5576, 5612. First of all, this language indicates that the right to sue is conferred on private citizens pursuant to the standards of *liability* developed under § 6973; it does not say private citizens are entitled to the same *remedies* that are available to the EPA under § 6973. In addition, it is the right to sue "to abate"—a "limited right" at that—that is conferred pursuant to the standards of liability under § 6972, not any right to recover abatement costs. Even the *KFC Western* majority recognizes that "the legislative history cuts both ways," *KFC Western*, 49 F.3d at 521 n.3, but the court nevertheless relies on it to read §§ 6972 and 6973 as granting authority to award identical remedies to private plaintiffs and to governmental plaintiffs. From an arguably faulty premise, then, the court goes on to misconstrue two Eighth Circuit opinions involving governmental plaintiffs and to conclude that § 6972 authorizes the recovery of cleanup costs by private plaintiffs. In the two cases from this Circuit upon which the *KFC Western* court relies, the issue of whether cleanup costs may be recovered in a governmental action under § 6973(a) was never before this Court.

In *United States v. Northeastern Pharmaceutical & Chemical Co. (NEPACCO)*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987), the United States in a cross-appeal challenged the district court's refusal to award "response costs" under § 6973(a), a decision made because the court believed the statute required a showing of negligence and the government had made none. The Eighth Circuit reversed that holding on the negligence

issue, but never made a finding that the recovery of response costs was available to the government under § 6973 in the first instance, apparently because the jurisdiction of the district court to award the recovery of such costs under RCRA was unchallenged. The issue may have been overlooked because many of the costs sought by the government were explicitly recoverable as response costs under CERCLA.

In *United States v. Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373 (8th Cir. 1989), the RCRA claim for "response costs" had been dismissed by the district court on the basis of its conclusions concerning the "imminent and substantial endangerment" and the "contributed to" language found in § 6973(a). The Eighth Circuit reversed and remanded for further proceedings, but again never addressed whether the remedy sought was authorized by § 6973.

Thus in both *NEPACCO* and *Aceto*, because the defendants did not raise the issue of subject matter jurisdiction and neither the district courts nor this Court addressed it *sua sponte*, the decisions reflect no consideration of the jurisdictional issue; instead, they simply assume subject matter jurisdiction *sub silentio* and deal with the merits of the EPA's claims to recover cleanup costs. Now that the jurisdictional question is squarely before us, the opinions in *NEPACCO* and *Aceto* are not *stare decisis* on the issue, because the panels in those cases simply assumed, without deciding, that the federal courts are empowered by § 6973 to award the EPA the recovery of cleanup costs. Moreover, except for the *KFC Western* case, the Furrers have identified for us, and we have found, no cases specifically addressing the availability of a monetary remedy in § 6972 citizen suits since the 1984 amendment (or before 1984 for that matter) that have concluded that § 6972 provides such a remedy. There are several cases from federal district courts, however, that have decided as we do today. *See, e.g., Portsmouth Redev. & Housing Auth. v. BMI Apartments Assocs.* , 847 F. Supp. 380,

385 (E.D. Va. 1994); *Triffler v. Hopf*, No. 92 C 7193, 1994 WL 643237, at *5 (N.D. Ill. Nov. 4, 1994); *Gache v. Town of Harrison, N.Y.*, 813 F. Supp. 1037, 1045 (S.D.N.Y. 1993); *Fallowfield Dev. Corp. v. Strunk*, Nos. CIV. A. 89-8644, CIV. A. 90-4431, 1993 WL 157723, at *14-15 (E.D. Pa. May 11, 1993); *Commerce Holding Co. v. Buckstone*, 749 F. Supp. 441, 445 (E.D.N.Y. 1990). Having done our own independent analysis of the issue, we must respectfully disagree with the holding of our sister circuit in *KFC Western*.

IV.

Our holding leaves the Furrers without a remedy under § 6972 for the recovery of the costs they have incurred in cleaning up their property. We are not unsympathetic to the Furrers' case, but we cannot justify inferring a remedy under § 6972 for the recovery of cleanup costs when we are unable to find any indication that Congress intended to create such a remedy. "The ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law."*Touche Ross* 442 U.S. at 578. An important part of the statutory scheme in this case is the preservation of remedies under state law. Counsel represented to the Court at oral argument that the Furrers are pursuing their state law remedies in state court. Nothing in this opinion is intended to hinder them in that pursuit.

For the reasons stated, the judgment of the District Court is affirmed.

BENNETT, District Judge, concurring.

Judicial fathoming of Congressional intent is often a treacherous voyage. That is not so here. I wholeheartedly agree with Judge Bowman's well-reasoned and carefully crafted opinion holding that Congress did not intend to create in § 6972 an implied private right of action for the recovery of cleanup costs. I join this opinion unreservedly for I find Judge Bowman's

application of the factors identified in *Cort v. Ash*, 422 U.S. 66 (1975), and his divination of Congressional intent, to be unassailable.

The Ninth Circuit Court of Appeals in *KFC Western, Inc. v. Meghrig*, 49 F.3d 518, 523 (9th Cir. 1995), and Judge Fagg, in dissent here, may well be right that it may be "unfair and poor public policy to interpret § 6972(a)(1)(B) as barring restitution actions." However, I would add that under our tripartite system of government, it is for Congress, not the federal courts, to make such policy choices. *See, e.g., Hudson Distribs., Inc. v. Eli Lilly & Co.*, 377 U.S. 386, 395, 84 S. Ct. 1273, 1279-80, 12 L. Ed. 2d 394 (1964); *Baltimore & Ohio Ry. Co. v. Jackson*, 353 U.S. 325, 331, 77 S. Ct. 842, 846, 1 L. Ed. 2d 862 (1957); *Black Hills Institute Of Geological Research v. South Dakota School of Mines & Technology*, 12 F.3d 737, 744 (8th Cir. 1993). The role of the federal courts, "of course, is as interpreters of the words chosen by Congress, not as policymakers or enlargers of congressional intent." *United States v. Gibbons*, 25 F.3d 28, 33 (lst Cir. 1994).

FAGG, Circuit Judge, dissenting.

For the reasons stated by the Ninth Circuit in *KFC Western, Inc. v. Meghrig*, 49 F.3d 518 (9th Cir. 1995), I believe the Resource Conservation and Recovery Act's citizen suit provision, 42 U.S.C. § 6972(a)(1)(B), authorizes an innocent private purchaser of property contaminated with solid or hazardous waste to bring an equitable action for reimbursement of clean-up costs. Because the statute permits citizens to obtain injunctive or other equitable relief, "a restitutionary remedy . . . falls within the statutory allowance for district court orders that [polluters] take 'such other action as may be necessary.'" *KFC Western*, 49 F.3d at 521 (quoting 42 U.S.C. § 6972(a)(1)(B)). Given this jurisdictional framework, I readily agree with the Ninth Circuit that it "would be unfair and poor public policy to interpret §

6972(a)(1)(B) as barring restitution actions." *Id.* at 523. Thus, I would reverse the district court.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 4:93-CV-2276 (CEJ)

J. RICHARD FURRER, et al.,
Plaintiffs,

vs.

DONALD F. BROWN, et al.,
Defendants.

ORDER

[Filed: Aug. 4, 1994]

In accordance with the Memorandum filed herewith this date,,

IT IS HEREBY ORDERED that defendants' motions to dismiss are granted.

IT IS FURTHER ORDERED that this action is dismissed for lack of subject matter jurisdiction

/s/ Carol E. Jackson
CAROL E. JACKSON
UNITED STATES
DISTRICT JUDGE

Dated this 4th day of August, 1994.

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 4:93-CV-2276 (CEJ)

J. RICHARD FURRER, et al.,
Plaintiffs,

vs.

DONALD F. BROWN, et al.,
Defendants.

MEMORANDUM

[Filed: Aug. 4, 1994]

This matter is before the Court on the defendants' motions to dismiss. *See* Fed. R. Civ. P. 12(b)(1) and (6). Plaintiffs oppose these motions.

Plaintiffs bring this action to recover expenses they incurred in remediating soil contamination caused by leaking underground petroleum storage tanks. Plaintiffs are the owners of property located at 4701 Gravois in the City of St. Louis, Missouri. Defendants Donald F. Brown, Dorothy J. Brown, Louis F. Fagas, and Geraldine Fagas are all previous owners of the property. Defendant Shell Oil Company formerly leased the property and operated an automobile service station there.

In Count I plaintiffs assert a claim pursuant to 42 U.S.C. § 6972(a)(1)(B) against all defendants for violation of the Resource Conservation and Recovery Act ("RCRA"), as amended by the Hazardous and Solid Waste Amendments of 1984, Pub.L. 98-616, Title IV, § 401(a)(3), Nov. 8, 1984. Plaintiffs' assert a claim for "equitable indemnity" against all defendants in Count III, for quantum meruit against all defendants in Count III, and

for unjust enrichment against defendants Donald F. Brown and Dorothy J. Brown in Count IV. Jurisdiction of Count I is premised on 28 U.S.C. § 1331; the plaintiffs invoke the Court's supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over the remaining counts.

Defendants move to dismiss Count I of plaintiffs' complaint arguing that the citizen suit provision of RCRA, 42 U.S.C. § 6972(a)(1)(B), does not authorize a private cause of action for damages. This statute provides, in pertinent part:

> Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf — . . .
>
> (B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment. . .

The RCRA citizen suit provision is designed to provide a cause of action to individuals acting as "private attorneys general" as opposed to individuals seeking to secure private relief. *Environmental Defense Fund, Inc. v. Lamphier,* 714 F.2d 331, 337 (4th Cir. 1983); *Commerce Holding Co. v. Buckstone*, 749 F.Supp. 441, 445 (E.D.N.Y. 1990). This intent is evidenced by the limited jurisdiction of a court with respect to the remedies available in a citizen suit action. 42 U.S.C. § 6972(a) provides:

> The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties,

> to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), *to restrain* any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 6928(a) and (g) of this title. (emphasis added).

Plaintiffs in this case have cleaned up the petroleum contamination on the property and now seek to recover the cost incurred in doing so. Recognizing that the plain language of the citizen suit provision of RCRA does not provide for a cause of action for damages, plaintiffs attempt to characterize the relief they seek as equitable in nature. Despite the terminology plaintiffs use to describe their remedy in this case, they are essentially seeking monetary damages. *See Buckstone*, 749 F.Supp. at 445; *Portsmouth Redevelopment and Housing Authority v. BMI Apartments Associates*, 1994 WL 106698, *2 (E.D. Va. 1994).

The plain language of a statute is the first place to look when determining its meaning. *Russello v. United States*, 464 U.S. 16, 20 (1983). It is undisputed that the RCRA citizen suit provision does not expressly authorize a private right of action for damages. *See Portsmouth*, 1994 WL at * 3. Where a statute expressly provides for particular remedies, the court should be wary of reading other remedies into the statute. *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 14-15 (1981). Because the citizen suit provision expressly permits only injunctive relief, the Court is reluctant to imply a cause of action for damages.

Although this is a case of first impression in this Court, most of the courts who have considered the issue have determined that

RCRA does not authorize a plaintiff to recover past remediation costs. *Buckstone*, 749 F.Supp. at 445-46; *Portsmouth*, 1994 WL 106698 at * 3; *Gache v. Harrison*, 813 F.Supp. 1037, 1045 (S.D.N.Y. 1993); *Kaufman and Broad-South Bay v. Unisys Corporation*, 822 F.Supp. 1468, 1477 (N.D. Cal. 1993); *Dominick's Finer Foods, Inc. v. Amoco Oil Company*, 1993 WL 524808, at n.5 (N.D. Ill. 1993); *Walls v. Waste Resource Corp.*, 761 F.2d 311, 316 (6th Cir. 1985); David C. Shilton, *Groundwater Pollution Litigation in the Federal Courts: An Evaluation of Three New Private Remedies*, 3 J. Envtl. L. & Litig. 91, n. 162 (1988); Kevin R. Duncan and B. Todd Bailey, *Innocence Amid "Lust": The Innocent Buyer and Leaking Underground Storage Tanks Containing Petroleum*, 7 B.Y.U. J. Pub. L. 245 (1993) ("In fact, no court has awarded damages under the citizen's suit provisions to an innocent purchaser of real estate containing a leaking UST [underground storage tank].")

Plaintiffs rely on *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987) (*NEPACCO*) in support of their position that RCRA allows a private right of action to recover the costs of remediating contaminated soil. Plaintiffs assert that the court in NEPACCO ruled that the United States, as a plaintiff in a RCRA proceeding under 42 U.S.C. § 6973(a), could recover its remediation costs from the entities responsible for contaminating its property. Plaintiffs argue that because 42 U.S.C. § 6973(a) limits the remedies in the same way as 42 U.S.C. §6972(a), they should be able to recover their remediation costs.

The court in *NEPACCO* did not rule that the United States could recover restitution under RCRA for remediating contaminated soil. Instead, the court held that the government could recover its pre enactment response costs under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). *NEPACCO*, 810 F.2d at 749. The court's decision concerning RCRA was limited to the holding that

"RCRA imposes strict liability upon past off-site generators and transporters of hazardous substances." *Id.* Contrary to plaintiffs' assertions, the court in *NEPACCO* did not find that a litigant could recover damages under RCRA.

Moreover, RCRA authorizes the Environmental Protection Agency or a state to recover cleanup costs incurred in remediating contamination caused by petroleum leaking from an underground storage tank. 42 U.S.C. § 6991b(h)(6)(A). In contrast, RCRA does not mention whether a private litigant may recover these costs. *Expressio unius est esclusio alterius.* Therefore, it is likely that Congress intended to allow government entities to recover their past remediation costs, while affording private litigants only injunctive relief. *See Russello*, 464 U.S. at 22, *quoting United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972) ("[W]here Congress includes particular language in one part of the statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.")

Finally, in order to prevail on their claim under RCRA, the plaintiffs must plead and prove that the leaking petroleum presents "an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). Plaintiffs make no such allegation here. Further, as the plaintiffs have completely cured the contamination at issue in this case it will be impossible for them to prove that the petroleum contamination currently presents an imminent and substantial endangerment to the health or the environment.

Because the Court does not have jurisdiction over a suit under 42 U.S.C. § 6972(a)(1)(B) for "restitution" to recover costs associated with remediating petroleum contamination from leaking underground storage tanks, defendants' motion to dismiss will be granted as to Count I. Further, the Court will decline to exercise supplemental jurisdiction over the remaining counts and these counts also will be dismissed. 28 U.S.C. § 1367(c)(3).

/s/ Carol E. Jackson
CAROL E. JACKSON
UNITED STATES
DISTRICT JUDGE

Dated this 4th day of August, 1994.

Supreme Court, U.S.
FILED
MAR 17 1996
CLERK

(2)

No. 95-1280

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

BI-STATE DEVELOPMENT AGENCY OF THE MISSOURI-ILLINOIS METROPOLITAN DISTRICT,
Petitioner,

v.

ABBOTT AMBULANCE, INC.
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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8 pp

QUESTIONS PRESENTED

1. Whether the district court and Court of Appeals correctly determined that there is no private right of action to recover past remediation costs under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972(a).

2. Whether RCRA's jurisdictional requirement that a site present "an imminent and substantial endangerment to health or the environment," 42 U.S.C. § 6972(a)(1)(B), can be met where the site was completely remediated prior to suit.

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Statute

Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. § 6972(a) .....*passim*

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner, Bi-State Development Authority of the Missouri-Illinois Metropolitan District ("Bi-State"), exercising its power of eminent domain, filed an action in the Circuit Court for the City of St. Louis in February 1991 to condemn property owned by Respondent, Abbott Ambulance, Inc. ("Abbott"). While the condemnation litigation was pending, Bi-State admittedly completed a remediation of the site by removing underground storage tanks and soil contaminated with petroleum. In the condemnation litigation, Bi-State claimed that Abbott's con-

demnation award should be reduced to reflect the impact of the alleged contamination and Bi-State's remediation costs. The parties subsequently settled, and the condemnation litigation was dismissed with prejudice.

Having had its day in state court, Bi-State attempted, by recasting the dispute in federal court as a RCRA claim with eight pendent state law claims, to relitigate its entitlement to recover from Abbott the same alleged remediation costs at issue in the condemnation proceeding. Abbott moved to dismiss the RCRA claim on two grounds: First, there is no private right of action under RCRA to recover past remediation costs; second, since Bi-State alleged it had completely remediated the site, RCRA's jurisdictional requirement could not be met because the site did not present "an imminent and substantial endangerment to health or the environment," as required by 42 U.S.C. § 6972(a)(1)(B).

The district court dismissed the RCRA claim, finding that it "does not have jurisdiction over a 'citizen's suit' seeking restitution pursuant to 42 U.S.C. §6792(a)," and declined to exercise supplemental jurisdiction over the remaining claims. Notably, in granting the motion to dismiss, the district court explicitly refused to follow the Ninth Circuit's decision in *Meghrig v. KFC Western, Inc.*, 49 F.3d 518 (9th Cir. 1995), *cert. granted*, 516 U.S. ___ (No. 95-83, September 27, 1985), which is now under submission to this Court. On appeal by Bi-State, the Eighth Circuit summarily affirmed. The Court ruled that its previous holding in *Furrer v. Brown*, 62 F.3d 1092 (8th Cir. 1995), *petition for cert. filed*, No. 95-1378 — that there is no implied private right of action under RCRA to recover past cleanup costs — was the law of the Circuit and was dispositive here.

REASONS FOR DENYING OR POSTPONING CONSIDERATION OF THE WRIT

The petition should be denied or consideration postponed because the identical issues recently were briefed and argued to this Court in *Meghrig*, No. 95-83 (oral argument held January 10, 1996). In addition to the briefs of the parties in that case, amicus briefs were filed by the United States, various states' attorneys general (including the Missouri Attorney General), a variety of petroleum marketing groups, and Bi-State, the petitioner in this case. Since these issues already have been exhaustively addressed in this Court, there is no reason for the Court to accord independent consideration to this petition because the Court's ruling in *Meghrig* will be dispositive here.

Bi-State concedes that *Meghrig* "raises the identical issue of whether restitution is an available remedy under RCRA's citizen suit provision." (Pet. 20.) Bi-State also acknowledges that *Meghrig* involves the additional question whether the RCRA jurisdictional requirement that there be an imminent and substantial threat to health or the environment can be met when the cleanup has already been completed. (Pet. 7.)

Bi-State incorrectly asserts, however, that this case and *Meghrig* are different because the imminent and substantial threat requirement is not at issue here. (Pet. 7, 20 n.6.) On the contrary, Abbott's motion to dismiss asserted as a separate ground for dismissal that there was no imminent and substantial threat because Bi-State's Amended Complaint alleged that the cleanup was complete. (Amended Complaint ¶¶ 22, 82-83; Motion to Dismiss at 2-3.) Abbott also raised this argument in the Eighth Circuit (Brief for Appellee at iii), but that court did not reach it because of its resolution of the private-right-of-action issue.

Thus, if this Court reverses *Meghrig* and holds *either* that there is no private right of action under RCRA to recover past remediation costs *or* that there is no jurisdiction under RCRA because

there can be no imminent and substantial threat to human health or the environment when the cleanup has already occurred, the Eighth Circuit's disposition of this case will have been vindicated and certiorari should be denied. If *Meghrig* is resolved on the merits in some other fashion, then this case should probably be remanded for reconsideration in light of that ruling. If for some reason *Meghrig* is not decided on the merits and the Court wishes to decide the RCRA issues, the Court should grant certiorari in *Furrer* rather than in this smaller case involving two not-for-profit organizations. As Bi-State acknowledges, *Furrer* presents the same issue as *Meghrig* and this case, and a petition for certiorari was filed in *Furrer* one month earlier than Bi-State's (Pet. 20). Moreover, the Eighth Circuit's opinion in *Furrer* was the basis for that court's summary affirmance in the present case.

Bi-State requests the Court to postpone consideration of this Petition pending the Court's disposition of *Meghrig*, and Abbott has no objection if the Court so chooses. But there is no basis for Bi-State's suggestion that this case should be consolidated with *Meghrig*, which has already been fully briefed and argued.

CONCLUSION

The petition for certiorari should be denied; alternatively, consideration should be postponed because the identical issues have already been briefed and argued to this Court in *Meghrig*, and the Court's decision in that case will govern the disposition of the Petition in this case.

Respectfully submitted,

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